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No. 87-447

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARTIN HARRIS, *et al.*,
Plaintiffs-Respondents

v.

IRENE PERNSLEY, *et al.*
Defendants-Respondents

RONALD D. CASTILLE,
Proposed Intervenor-Petitioner

Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals Rule Correctly that the Philadelphia District Attorney Had No Sufficiently Direct or Substantial Interest in this Prison Overcrowding Litigation to Permit Intervention As of Right?

2. Is the Decision of the Court of Appeals to Apply an Abuse of Discretion Standard of Review When Assessing a Denial of Intervention Sufficiently Important to Warrant a Grant of Certiorari by This Court?

3. Based on Its Affirmance of the Denial of the District Attorney's Motion to Intervene, Did the Court of Appeals Properly Dismiss the District Attorney's Appeal of the Merits of the Consent Decree Approved by the District Court?

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MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This class action was brought on behalf of all past, present, and future inmates against City and State officials alleging unconstitutional overcrowding in part of the Philadelphia Prison System. On April 30, 1982, the plaintiff-respondents (hereinafter "plaintiffs") filed a *pro se* complaint. The district court appointed counsel to represent the plaintiff class on November 12, 1982. Counsel then filed an amended complaint on April 19, 1983. All defendants moved to dismiss the plaintiffs' amended complaint, and on January 3, 1984, the district court granted the motion to dismiss.

On January 20, 1984, the plaintiffs appealed the district court's dismissal to the United States Court of Appeals for the Third Circuit. On February 22, 1985, the Third Circuit reversed the district court's decision, *Harris v. Pernsley*, 755 F.2d 338 (3d Cir. 1985), and denied rehearing *in banc* on March 28, 1985. *Harris v. Pernsley*, 758 F.2d 83 (3d Cir. 1985). On June 17, 1985, the municipal respondents (hereinafter "City defendants") filed a Petition for Writ of Certiorari in this Court, which was denied on November 4, 1985. *Harris v. Pernsley*, 474 U.S. 965 (1985).

On December 23, 1985, the district court began conducting pretrial conferences to expedite resolution of this case. On January 27, 1986, the plaintiffs filed a second amended complaint, alleging the unconstitutionality of conditions in the entire Philadelphia Prison System due to overcrowding.

Philadelphia prisons are overcrowded. After working with the plaintiffs and the state criminal courts over a six-month period, the City defendants agreed to a settlement in this litigation that would have alleviated that overcrowding and avoided the release of any inmates. Instead of relying on prison population caps, the consent decree proposed by the parties ("Proposed Consent Decree I") contained provisions for a priority court listing system in the state criminal courts, ensuring that the criminal hearings of all future inmates would be held in a timely manner. No person would be released if the hearings or trials were held within the prescribed time frames. Even if releases occurred, criminal prosecution would remain unaffected; it would simply proceed as if the inmate had made bail. Proposed Consent Decree I also mandated early parole for individuals sentenced to a minimum of less than one year in the Philadelphia Prison System, provided the individuals did not present a danger to themselves or others. In essence, Proposed Consent Decree I attempted to meet both the concerns of the local criminal justice system and the desire of the City defendants to provide a constitutional penal environment. It did not rely on population caps to do so.

The plaintiffs and the City defendants submitted Proposed Consent Decree I to the district court on August 15, 1986. On August 18, 1986, the District Attorney of Philadelphia, petitioner here, filed his Motion to Intervene, which was opposed by the plaintiffs and the City defendants. Before the district court held an evidentiary hearing on the motion, the City defendants met with representatives from the District Attorney's office and the administration of the state criminal court system. The City defendants were informed that the Philadelphia criminal justice system opposed Proposed Consent Decree I as being too intrusive into the operations of the state courts and were requested to negotiate with the plaintiffs to obtain a settlement that included population caps for the Philadelphia Prison System. In addition, the City defendants were told to leave implementation of the population caps to the state courts.

Following this request, the City defendants and the plaintiffs negotiated and agreed to Proposed Consent Decree

II, which was forwarded to the district court on October 3, 1986. Although not opposed to population caps in principle, the District Attorney disagreed with the actual figures contained in Proposed Consent Decree II; he contended that the proper prison population maximum should be 4400, approximately 200 more inmates than were being housed in the Philadelphia Prison System at the time.

The district court held hearings on the District Attorney's Motion to Intervene on October 10, 1986, October 27, 1986, November 14, 1986, and December 11, 1986. The District Attorney's alleged basis for intervention was his duty to protect the public safety and to prosecute criminal matters. He argued that these interests were sufficient for the district court to grant him intervention as of right, or in the alternative, permissive intervention.

On December 31, 1986, the district court denied the District Attorney's Motion to Intervene as a party defendant. The court concluded that the District Attorney did not have a sufficient interest in the litigation, that the petition was not timely filed, and that the City defendants had adequately represented any interests that the District Attorney might have in the litigation. On the same day, the district court approved Proposed Consent Decree II, having heard argument on October 10, 1986, November 14, 1986, and December 11, 1986. The court found the consent decree to be a fair and equitable settlement of the matter.

On January 8, 1987, the District Attorney appealed the orders denying his Motion to Intervene and approving the consent decree to the Court of Appeals for the Third Circuit.[1] On May 15, 1987, the Court of Appeals for the Third Circuit affirmed the district court's denial of the District Attorney's Motion to Intervene and dismissed the District Attorney's appeal from the approval of the Settlement Agreement. On May 29, 1987, the District Attorney filed a Petition for Panel Rehearing and Rehearing In Banc; on June 15, 1987, the court denied rehearing. The court issued the certified judgment, in lieu of a formal mandate, on June 23, 1987.

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1. City defendants rely on the District Attorney's Statement of the Case concerning the procedural history of his applications for stays.

The District Attorney has now petitioned this Court for a writ of certiorari, arguing that enforcement of the consent order requires the wholesale release of prisoners. On the contrary, the district court never ordered, required, or recommended releases. Instead, the district court ordered maximum allowable population levels, to be implemented over a preplanned and scheduled period of time. *See* Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter "App.") 74 at ¶ 2(f), (g). (The population levels and timetable were amended by the district court's order of July 14, 1987. *See* Appendix attached hereto at A-1.) If the City defendants fail to meet the prescribed population levels, the order directs that they will seek individual state court reviews of persons either being held on the lowest bail pending trial or with less than 60 days remaining to serve on their county sentences (that is, sentences of less than 2 years). Furthermore, the order clearly states that the City defendants shall not even seek court review of any person charged with, or convicted of, murder or forcible rape, or any person whose release would constitute an imminent threat to public safety or to the inmate's own health, safety, or welfare. *See* App. 75 at ¶ 4. Only after such processes are completed and the population levels still exceed the maximum allowable levels are the City defendants prohibited from accepting additional admissions, with the exception of persons charged with, or convicted of, murder, forcible rape, or a crime involving the use of a gun or knife in the commission of an aggravated assault or robbery, until the maximum allowable population is met. *See* App. 76 at ¶ 5.

The individual state court reviews will occur through an established procedure that has operated since 1981 and has been upheld by the Pennsylvania courts. *See, e.g., Jackson v. Hendrick*, 498 Pa. 270, 446 A.2d 226 (1982). In this process, the District Attorney is given notice of each inmate being considered for bail reduction or release on early parole. An individual hearing is conducted by a judicial officer, and the District Attorney has the full opportunity to appear and to object. Thereafter, he retains the right to appeal any adverse decision. Thus, the district court never ordered wholesale prisoner releases but instead adopted an already-existing, law-

ful process to achieve acceptable prison population levels. Individual decisions regarding releases are made by officers of the state criminal court system, with full participation by the District Attorney at each hearing.

Since October 1986, the prison population has decreased from approximately 4300 to approximately 4000 inmates as of this filing. In the summer months of 1987, the prison population consistently remained below 4000. This decrease was accomplished by a variety of methods, none of which entailed wholesale prisoner releases or any undue threat to public safety. Instead, besides completing construction of a new prison facility, proceeding with construction plans for another holding facility, and continuing to increase the operating and capital budgets for the prisons, the City defendants undertook preliminary planning with state criminal court administrators to institute systemic changes to avoid any wholesale release of prisoners in the future. For example, on January 14, 1987, Chief Justice Robert N.C. Nix, Jr., of the Pennsylvania Supreme Court, directed that persons in detention should receive priority state court listings to expedite disposition of their cases. This directive was implemented by the state court system. Also, the local court administrators instituted a process of scheduling the 250 oldest detention cases (persons held in pretrial status in the Philadelphia prisons) for trial during the summer of 1987. In addition, by working with the state criminal courts, the City defendants significantly decreased the number of state prisoners who were being lawfully held in the Philadelphia Prison System. Last, the state criminal courts agreed to increase the frequency of the bail review hearings and the number of cases heard at each listing.

Notwithstanding these efforts, the population of the Philadelphia Prison System began to exceed the court-ordered maximums in late August 1987. Thus, on September 22, 1987, the City defendants filed a Motion to Enlarge Time in the district court. Following negotiations between the City defendants and the plaintiffs, the parties submitted a Stipulation regarding implementation of the terms of the consent order. On September 25, 1987, the district court entered an order approving the Stipulation, on the condition that the City

defendants continue to work with the state court administration to develop a plan for the permanent amelioration of overcrowding. *See* Appendix attached hereto at A-4.

Consistent with the plan to develop a permanent solution to the overcrowding problem, the City defendants intend to concentrate both on decreasing the number of pretrial inmates detained with the lowest bail and on shortening the length of time all detainees remain incarcerated. As of October 1, 1987, approximately 280 persons were detained on $2500 bail or less and without any other court detainers. (In Philadelphia, persons are permitted to post ten percent of their bail in order to be free from incarceration pending trial. This means that these persons would be free pending trial if they could produce $250 or less.) By decreasing, through the bail review process, the number of such persons being detained for long periods of time, the City defendants hope to decrease the prison population without any wholesale release of inmates, without any undue risk to the general public, and without denying the District Attorney his role in the accepted bail review process.[2]

ARGUMENT

An examination of the opinion of the Court of Appeals for the Third Circuit reveals three issues properly available for review by this Court at this time: the affirmance of the district court's denial of intervention as of right; the adoption of an abuse of discretion standard of review in intervention cases; and the dismissal of the non-party's appeal of the merits of the consent decree. Ultimately, none of these issues is sufficiently meritorious to warrant the Court's granting of certiorari.

I. The Court of Appeals Properly Affirmed the District Court's Denial of Intervention.

Central to the holding of the Court of Appeals for the

2. Since filing his petition for certiorari, the District Attorney reapplied to this Court for a stay of the district court's consent order. After being instructed to seek relief in the court of appeals, he filed a second Motion to Recall and Stay Issuance of Mandate and Execution and Enforcement of the Judgment Pending Petition for Certiorari on September 29, 1987. The Court of Appeals for the Third Circuit denied that motion on October 5, 1987.

Third Circuit in this matter was its decision to affirm the district court's denial of intervention as of right. The court based that ruling on its determination that the District Attorney had an insufficient interest in the litigation to require his intervention. *Harris v. Pernsley*, No. 87-1025, slip op. at App. 125 (3d Cir. May 15, 1987).[3] The District Attorney seeks this Court's review of the appellate court's decision by arguing that the court sanctioned an "unwarranted intrusion into a state court criminal justice system." *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter "Petition for Certiorari") at 19. By focusing on the terms of the consent decree rather than on the nature of the underlying litigation, the District Attorney has attempted to misdirect the attention of this Court to the merits of the consent decree, an issue not addressed by the court of appeals. In fact, the only issue that court decided and, therefore, the only issue properly before this Court, is whether the district court correctly denied intervention.[4] A

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3. Although the opinion of the court of appeals is reported at 820 F.2d 592 (3d Cir. 1987), for ease of reference, the City defendants will cite to the opinion as reproduced in the Appendix to the Petition for Writ of Certiorari.

4. Because the court of appeals decided that the district court correctly held that the District Attorney had an insufficient interest to entitle him to intervene, it did not review the district court's conclusions concerning the other elements required by Fed. R. Civ. P. 24(a). To be entitled to intervene as of right, a putative intervenor must by timely application demonstrate a direct, legally cognizable interest in the litigation that will be affected by the disposition, and must also demonstrate inadequate representation of that interest by existing parties. *See, e.g., Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir.), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976).

In addition to ruling that the District Attorney had not established a sufficient interest in this lawsuit, the district court concluded that he failed to meet the other requirements imposed by Rule 24(a). Specifically, the court reasoned that the application for intervention was untimely, since the District Attorney knew or should have known, at least since this Court denied the City defendants' petition for certiorari on November 4, 1985, that settlement negotiations were likely. According to the district court, the District Attorney offered no adequate explanation for his failure to move to intervene then, rather than waiting until the eve of settlement, thereby greatly prejudicing the existing parties. *Harris v. Pernsley*, No. 82-1847, slip op. at App. 57-58 (E.D. Pa. Dec. 31, 1986). In addition, the district court

review of the Third Circuit's opinion confirms the soundness of the court's reasoning and counsels against a grant of certiorari.

In affirming the district court, the court of appeals correctly relied on this Court's decision in *Donaldson v. United States*, 400 U.S. 517 (1971), and ruled that to obtain intervention as of right pursuant to Federal Rule of Civil Procedure 24(a), the District Attorney must demonstrate a direct, significant, and legally protectable interest in the proceedings. He must also show that resolution of the lawsuit will directly affect that identified interest. Absent such an interest, and a showing of some direct effect, a court must deny intervention. *See Harris v. Pernsley* at App. 110-11, 122-23.

To determine whether any cognizable interest exists in a given case, a court must look to the purposes of the lawsuit.[5] *See, e.g., Alston v. Coughlin*, 109 F.R.D. 609, 613 (S.D.N.Y. 1986); *Dodson v. Salvitti*, 77 F.R.D. 674, 676 (E.D. Pa. 1977) (intervention denied in public housing litigation when purpose of complaint is to vindicate constitutional and statutory rights while intervenors' interest is in protecting property values); *East Powelton Concerned Residents v. United States Department of Housing & Urban Development*, 69 F.R.D. 392, 394 (E.D. Pa. 1975) (intervention denied in public housing litigation when purpose of complaint is to vindicate constitu-

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concluded that any purported interest of the District Attorney was adequately represented by the City defendants, as demonstrated especially by their willingness to renegotiate Proposed Consent Decree I after learning of the District Attorney's objections to that proposal. *Id.* at App. 62-63. (References to the district court opinion are to the Appendix to the Petition for Writ of Certiorari. The opinion is reported at 113 F.R.D. 615 (E.D. Pa. 1986)).

5. The Third Circuit correctly reasoned that although "the scope of [the District Attorney's] interest is defined by the scope of his legal duties under Pennsylvania law[,]" whether those duties are sufficient to accord a right to intervene is a matter of federal law. *Harris v. Pernsley* at App. 113 & n.7. *See also New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 n.29 (5th Cir.) (even in diversity case, in which federal court looks to substantive state law, federal law governs requirements for intervention, including the character of interest necessary for intervention), *cert. denied sub nom. Morial v. United Gas Pipeline Co.*, 469 U.S. 1019 (1984).

tional and statutory rights while intervenors' interest lies in halting demolition of certain houses).

The court of appeals recognized these general guidelines and was also mindful that intervention disputes should be resolved in a pragmatic manner. *See Harris v. Pernsley* at App. 110-11. To that end, the court analyzed both the terms of the consent decree and the duties of the District Attorney, to determine whether those duties were sufficient to create an interest entitling the District Attorney to intervene in this prison conditions lawsuit. The Third Circuit carefully considered the interests proffered by the District Attorney but rejected them as not comprising the type of direct interest necessary to require intervention, either to oppose the plaintiffs' claims of unconstitutionality or, more important, to participate in formulating a remedy. *See id.* at App. 115-25. Specifically, the court of appeals ruled that the consent decree neither expressly nor implicitly impinged, in more than an incidental manner, on any of the interests identified by the District Attorney as requiring his intervention in this lawsuit. *See id.* at App. 120-25. In other words, the Third Circuit recognized, and gave due consideration to, the District Attorney's legitimate role in state court criminal proceedings and decided that that role is simply not at issue in this civil prison overcrowding litigation.[6] Here, the plaintiffs alleged uncon-

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6. Throughout this litigation, the District Attorney has refashioned his purported interest and now characterizes it as a general interest in all proceedings that result in prisoner releases. *See* Petition for Certiorari at 13. (*Compare Harris v. Pernsley* at App. 113, 116, relating District Attorney's assertion of interest as his duties as a public official charged with the enforcement of Pennsylvania's criminal laws.) In support of his claim, the District Attorney cites various statutes and state court opinions that define the duties of his office. Petition for Certiorari at 14-17 & nn.10 & 12 (citing *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972) (Commonwealth has burden of proof at bail hearings); *Commonwealth ex rel. Specter v. Bauer*, 437 Pa. 37, 261 A.2d 573 (1970) (District Attorney has authority to represent Commonwealth in criminal law enforcement proceedings); *Commonwealth v. Heiser*, 330 Pa. Super. 70, 478 A.2d 1355 (1984) (Commonwealth has burden of proof at bail hearings); *In re Miller*, 209 Pa. Super. 47, 224 A.2d 89 (1966) (Commonwealth has standing to appeal discharge of juvenile from state correctional institution); Pa. Stat. Ann. tit. 61, § 314

stitutionally overcrowded conditions within the Philadelphia Prison System. They neither complained of nor sought any changes in the way the District Attorney prosecutes criminal cases. The sole purpose of their complaint was to remedy the allegedly inadequate conditions of confinement in Philadelphia prisons.

As the Third Circuit noted, state law vests responsibility for those prison conditions in the executive branch of Philadelphia government. *Id.* at App. 116, 119. Specifically, the Philadelphia Home Rule Charter gives the Board of Trustees of the Philadelphia Prisons the direct authority to run the prisons, 351 PA. CODE § 5.5-701, and grants to the Mayor of Philadelphia the authority to allocate City monies, *id.* §§ 4.4-100, 4.4-101, and to determine the inmate capacity of the City prisons. *Id.* § 5.5-700(c). The District Attorney shares no responsibility whatsoever for the operation or maintenance of the Philadelphia Prison System. Since the complaint in this matter relates only to the operation and maintenance of that system, the District Attorney has no cognizable interest in this case. *See Graddick v. Newman*, 453 U.S. 928, 934 (1981) (Powell, J., in chambers) (when responsibility for operating prisons is vested in executive officer, unrelated government official is not proper party to litigate prison conditions).[7] *But see* 453 U.S. 928, 937 (1981) (Rehnquist, J., now C.J., in chambers).

Nonetheless, the District Attorney insists that this Court

(Purdon 1964) (sentencing judge has complete authority to parole inmates sentenced to terms of less than two years, after hearing and notice to all parties)). Significantly, the District Attorney fails to note the repeal by the Pennsylvania legislature of the single statutory provision that might have provided direct support for his alleged interest. Pa. Stat. Ann. tit. 16, § 1402(b) (Purdon 1964) (repealed) (specifically identifying role of prosecutor in prisoner discharges). He also neglects to note that the prosecutor is by statute granted a voice in decisions to place inmates in early release programs only when the inmate has not served the minimum sentence, and then only when the sentencing judge objects, and not otherwise. *See* Pa. Stat. Ann. tit. 61, § 1052 (Purdon Supp. 1987). Thus, Pennsylvania law does not unequivocally require the prosecutor's participation in all release decisions, as he asserts.

7. Although Justice Powell did not necessarily speak for the Court in *Graddick*, the full Court did affirm his earlier denial of a stay.

should review the Third Circuit's decision because the consent decree "effectively vitiates" his ability to defend and preserve "the integrity of incarceration orders he has obtained." *See* Petition for Certiorari at 14.[8] As the appellate court aptly noted, the District Attorney, in so defining his duties, has appropriated for himself a much larger role in the state criminal justice system than contemplated by any state caselaw, statutory, or regulatory authority. *See Harris v. Pernsley* at App. 123-24. Although the District Attorney would

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8. Under the guise of attempting to establish that he has a legitimate interest in this prison conditions lawsuit, the District Attorney consumes much of his argument with his effort to demonstrate the illegality of the consent decree itself. In the process, he completely misconstrues the terms of the decree and distorts the bail review procedure established by the decree. For example, the District Attorney insists that the consent decree calls for sentence modifications, inconsistent with state law. *See* Petition for Certiorari at 16-17. In fact, the consent decree establishes a procedure whereby the City defendants may seek court review of early parole requests, not sentence modification. Therefore, Pa. R. Crim. P. 1410 and Pa. R.A.P. 1763 are not at all implicated, much less violated, by the consent decree. Moreover, the requests for early parole are addressed to the sentencing court, and are therefore completely consistent with the procedure established by state statute. *See* Pa. Stat. Ann. tit. 61, §§ 314, 331.26 (Purdon 1964 & Supp. 1987).

Likewise, contrary to the District Attorney's assertions, nothing in the consent decree undercuts the bail guidelines established in the Pennsylvania rules of criminal procedure. The District Attorney apparently would like to convince this Court that the consent decree empowers the City defendants to release inmates at will. In fact, the consent decree requires that the City defendants *seek the release* of specified inmates in a proceeding before a judicial officer. In deciding whether or not to release a particular inmate, that officer of the court necessarily takes into account the bail guidelines established by procedural rule.

Finally, throughout his argument the District Attorney insists that he has no role in any of the proceedings adopted in the consent decree. This is absolutely untrue. In both the bail review and early parole hearings, the District Attorney has the opportunity to participate, object to release, and appeal any decision he deems to be adverse to his interest. At most, his job at those hearings might be made more difficult, in the face of a judicial officer's serious consideration of whether an inmate's continued detention is necessary. The District Attorney cannot seriously maintain that he is thereby prevented from fulfilling his duties under state law. As did the court of appeals, this Court should reject any such contention. This consent decree simply does not contravene state law.

apparently have this Court believe that he alone can uphold validly imposed bail and incarceration orders, he frankly claims an interest that is not his to assert. In fact, to the extent that maintaining the integrity of such orders is an interest implicated in this litigation, that interest belongs to the state courts themselves, not to the District Attorney. As did the court of appeals, this Court should reject the District Attorney's presumptuous assumption that "he has the right to oversee the entire criminal justice system in Philadelphia." *Id.* at App. 124.

Rather than accept the District Attorney's expansive construction of his interest, the Third Circuit properly delineated that interest as "the power and duty to advocate bail levels, to prosecute defendants, to recommend sentences once defendants are convicted, to defend convictions on appeal, and to defend challenges to the Commonwealth's penal statutes." *Id.* at App. 120. The District Attorney has failed to demonstrate how this litigation could have a cognizably direct and significant impact on that interest, as Federal Rule of Civil Procedure 24 requires. *See Donaldson v. United States*, 400 U.S. 517, 531 (1971). In the appellate court, the District Attorney attempted to establish an interest in the lawsuit by claiming that the parties' settlement might affect his ability to prosecute some cases. Specifically, he speculated that if releases become necessary to meet population caps, some released persons might fail to appear for court and thereby delay prosecution, and that an admissions moratorium would render his role as prosecutor meaningless. *See Harris v. Pernsley* at App. 121-22. The court of appeals correctly concluded that even assuming that such an effect might occur, it neither creates the direct, cognizable interest nor establishes the substantial impact on that interest that Federal Rule of Civil Procedure 24 requires. *Id.* at App. 125.

In assessing claims of indirect and speculative effects such as those identified by the District Attorney here, federal courts have consistently rejected intervention. This Court's reasoning in *Donaldson v. United States*, 400 U.S. 517 (1971), is especially enlightening. In *Donaldson*, a taxpayer sought intervention in a proceeding brought by the Internal Revenue Service to enforce a subpoena against the taxpayer's employer.

The subpoena demanded records containing financial information relating directly to the taxpayer. The Court denied intervention as of right, reasoning that despite the existence of an interest that "looms large in his eyes," *id.* at 530-31, the taxpayer had no sufficiently direct interest in the subpoena enforcement proceedings to satisfy the requirements of Rule 24(a). *Id.* at 531.

Similar reasoning governed the decisions in *Alston v. Coughlin*, 109 F.R.D. 609, 613 (S.D.N.Y. 1986) (intervention by prison guards rejected in prison conditions litigation, even though settlement affected work assignment practices for guards, since effect, although real, was at best indirect and speculative); *Clover Farms Dairy v. Brumbaugh*, 102 F.R.D. 118, 120 (M.D. Pa. 1984) (in suit between dairy industry and regulatory agency, interest of milk consumers in possible milk price changes exists but is too speculative and indirect for intervention analysis); *Dodson v. Salvitti*, 77 F.R.D. 674, 676 (E.D. Pa. 1977) (intervention denied even though contemplated effect may occur, since complaint did not directly call intervenors' asserted interest into issue); and *East Powelton Concerned Residents v. United States Department of Housing & Urban Development*, 69 F.R.D. 392, 394 (E.D. Pa. 1975) (although court decision may produce effect described, intervention denied because intervenor identified interest not contemplated by complaint). Thus, ample precedent supports the decision of the court of appeals to affirm the district court's conclusion that any effect this consent decree might have on the District Attorney is insufficiently direct, substantial, or protectable for Rule 24 purposes.

Significantly, the District Attorney asserted the same interest identified here in prior litigation and failed.[9] Most di-

9. It is also important to note that the City defendants previously raised issues to this Court, in this litigation, that are fundamentally similar to those raised by the District Attorney now. Specifically, in a 1984 petition for writ of certiorari in this matter, the City defendants objected to the prospect of undue federal court interference in the operation of the Philadelphia prisons. Now, in a slightly different context, the District Attorney raises, in essence, similar objections to what he perceives as judicial overreaching. Two years ago, this Court declined to consider the issue. *Harris v. Pernsley*, 474 U.S. 965 (1985). Having decided then that no issue was worthy of consideration in this case, the Court should likewise decline this petition.

rectly on point, the prosecutor moved to intervene in *Jackson v. Hendrick*, a state court civil rights lawsuit challenging the conditions in the Philadelphia prisons, when the state trial court instituted the same bail review process at issue here, to control overcrowding in the Philadelphia prisons. *Jackson v. Hendrick*, 498 Pa. 270, 446 A.2d 226 (1982). In addition, in a later attempt to join the District Attorney as a party in the case, it was urged that he "is the one official who has an interest in enforcing bail requirements with respect to detainees" in Philadelphia. *Jackson v. Hendrick*, 72 Pa. Commw. 63, 70, 456 A.2d. 229, 232-33 (1983). Both the Pennsylvania Supreme Court and, separately, the Pennsylvania Commonwealth Court rejected the contention that the District Attorney had established any interest in the prison litigation. The reasoning of the Pennsylvania Commonwealth Court is especially compelling:

> The equity action *sub judice* . . . is not about the setting of bail or the conduct of the District Attorney in carrying out his prosecutorial function. It seeks, rather, a remedy from unconstitutional prison conditions for which the District Attorney has no responsiblility.

Id. at 70, 456 A.2d at 233. *See also Jackson v. Hendrick*, 498 Pa. 270, 278 n.12, 446 A.2d 226, 227 n.12 (1982) (rejecting intervention as untimely, court also concluded, "Apart from his failure to establish any circumstances in support of intervention after entry of the decree, petitioner has failed to establish that denial of intervention has harmed his interests").

The decision of the Third Circuit in *Cobb v. Aytch*, 539 F.2d 297 (3d Cir. 1976), *cert. denied sub nom. Engelfried v. Aytch*, 429 U.S. 1103 (1977), is also instructive in assessing the interest of the Philadelphia District Attorney in litigation related to the operation of the Philadelphia prisons. In *Cobb*, the City and the Commonwealth effected a prisoner transfer to reduce overcrowding and tensions in the Philadelphia prisons. Prison inmates challenged the transfer, which took place pursuant to state statutes that prescribe specific procedures for making inmate transfers between state and county institutions. *Id.* at 298-99 & n.1. Thereafter, the inmates and the Commonwealth agreed to settle the matter, over the objec-

tion of another party to the suit, the Superintendent of the Philadelphia Prison System. *Id.* at 298-99. Ultimately, the court rejected the settlement because it directly and completely extinguished the Superintendent's statutory discretion in seeking inmate transfers. *Id.* at 301. The court addressed no issues of intervention, but did address the interests of the various defendants who appealed the settlement. The Philadelphia District Attorney was one of those defendants. The prosecutor claimed an interest in the inmate transfer process and opposed the settlement because "the consent decree undermines their efforts 'to protect inmate witnesses to crimes from harassment, threat, bodily harm and/or death.'" *Id.* at 300. Ultimately, the court concluded that the District Attorney had no cognizable interest in the prison operation at issue and stated that "we do not believe that the indirect injury which they have alleged is sufficient to confer standing." *Id.*

Although issues relating to standing are not identical to those confronted when assessing a proposed intervenor's interest in litigation, they are related. *See* 3B J. Moore, J. Kennedy & J. Lucas, *Moore's Federal Practice* § 24.07[2] (2d ed. 1986 & Supp. 1986-87) at 24-57. Using the reasoning employed in *Cobb*, any possible effect on prosecution resulting from this settlement is too indirect to give the District Attorney a cognizable interest in these proceedings, which relate only to the operation of and conditions within the prisons. That indirect interest could not support the District Attorney's participation in *Cobb* and should not support his attempted intervention here.[10]

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10. The District Attorney's attempt to rely on *Cobb* to support his position is unavailing. *See* Petition for Certiorari at 14 n.6. The District Attorney interprets *Cobb* to permit his intervention here because he has state-assigned responsibilities regarding releases, just as the Superintendent in *Cobb* had state-assigned responsibilities regarding prisoner transfers. Central to the reasoning in *Cobb*, however, was not the mere existence of responsibilities but the effect that the proposed consent decree would have on those duties. 539 F.2d at 300-01. The court in *Cobb* decided that the consent decree there could not be approved over the Superintendent's objection only because the terms of the consent decree completely and definitely voided the Superintendent's statutory discretion to seek transfers. *Id.* at 301. By contrast, the court of appeals in this case explicitly decided that the

This Court has previously ruled that when addressing issues of state law, it must accord great weight to the opinions of state courts and of federal courts sitting within a state when those courts have decided the issue. *Bishop v. Wood*, 426 U.S. 341, 346 (1976) (Court should accept interpretation of state law in which district court and court of appeals within state have concurred); *United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960) (Court reluctant to disturb interpretation of state law by federal court skilled in law of particular state); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946) (Court pays great deference to interpretation of state law by judges of courts more familiar with intricacies of local law and practice).

For this reason, the opinions in *Jackson* and *Cobb*, and the opinions of the court of appeals and the district court in this case, all of which weigh against the District Attorney's intervention here, should cause this Court to hesitate before disturbing the conclusions of the court below. This hesitance to disturb an interpretation of Pennsylvania law on which the state appellate courts have spoken, and in which both the court of appeals and the district court have concurred, also argues persuasively against a grant of certiorari here.

II. The Court of Appeals Applied the Correct Standard of Appellate Review in Affirming the Denial of Intervention.

In affirming the district court's denial of the District Attorney's motion to intervene, the Court of Appeals for the Third Circuit adopted an "abuse of discretion" standard of appellate review. *See Harris v. Pernsley* at App. 112. According to the District Attorney, the court of appeals thereby contributed to a conflict among the appellate courts that this Court should grant certiorari to resolve. *See* Petition for Certiorari at 26-28. Regardless of whether this issue, standing alone, is sufficiently substantial to be addressed by this Court at some point, the issue as presented in this case does not warrant

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consent decree does not alter or impinge on any of the District Attorney's state-assigned duties. Accordingly, the District Attorney's reliance on *Cobb* is misplaced.

review: the District Attorney's lack of any judicially cognizable interest is so glaring here that under either an abuse of discretion or an error of law standard of review, the Third Circuit correctly affirmed the district court's denial of intervention.

The conflict that appears to exist between the courts of appeals as to the standard of review applicable to the denial of a petition to intervene, *compare, e.g., County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986) (denial of motion to intervene as matter of right is reviewed *de novo*), *cert. denied*, 107 S. Ct. 1605 (1987) *with, e.g., United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 990 (2d Cir. 1984) (review under an abuse of discretion standard) *and Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (abuse of discretion standard of review); *see also H.L. Hayden Co. v. Siemans Medical Systems, Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (district court did not err in denying intervention of right); *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978) (rather than clear-cut test to determine required interest, court uses flexible analysis, focusing on particular facts and circumstances, measured by practical standard), is inadequately represented in the context of this case to be resolved by this Court.[11] In considering the issues before them, both the appellate court and the district court in this case conducted thorough and searching reviews sufficient to satisfy either a "plenary" ("*de novo*") or an "abuse of discretion" standard. Both courts fully reviewed the particular legal and factual circumstances of the

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11. Notably, the ostensible conflict that the District Attorney presents for this Court's review has existed at least since 1975. *Compare, e.g., United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975) (erroneous denial of application for intervention by right will be reversed), *cert. denied sub nom. National Org'n for Women, Inc. v. United States*, 425 U.S. 944 (1976) *with Rios v. Enterprise Ass'n Steamfitters Local Union #638*, 520 F.2d 352, 355 (2d Cir. 1975) (district court entitled to full range of reasonable discretion in determining whether requirements for intervention by right have been met). This case presents no extraordinary circumstances that would warrant review of an issue of such long standing. Indeed, as the discussion in the text demonstrates, this case is particularly inappropriate for that review.

case and determined that the District Attorney lacks a sufficient interest to intervene as of right.

In conducting its inquiry, the Court of Appeals for the Third Circuit examined the different legal tests to determine what type of interest is necessary to entitle an applicant to intervene as of right. The court decided to take a pragmatic approach to the question, considering " 'all [of] the competing and relevant interests raised by an application for intervention.' " *Harris v. Pernsley* at App. 111 (quoting *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984)). The court then thoroughly considered the question of what scope of review applies to the denial of a motion to intervene. Writing for the court, Judge Seitz recognized the need to avoid "setting strict legal standards" to measure Rule 24(a)(2) applications and adopted an abuse of discretion standard of review. *Harris v. Pernsley* at App. 112.[12] In reality, the court applied a hybrid of the traditional "plenary" and "abuse of discretion" standards. Consistent with this standard of review, the Third Circuit stated that it would reverse a district court ruling if an improper legal standard was applied or if an incorrect conclusion was reached. *Id.* at App. 113.

In actually applying this standard, the appellate court comprehensively reviewed the asserted interests of the District Attorney and also analyzed whether those interests were directly affected by the instant litigation. The court undertook an independent review of the entire record; it did not depend solely on the district court's findings. Specifically, the court examined applicable state law, which formed the basis of the District Attorney's asserted interests, in light of the factual situation presented by the parties at the hearings held by the district court. *Id.* at App. 113-17. Based on this searching review, literally the functional equivalent of a plenary review, the court determined that the District Attorney's interest in the case is not sufficient for intervention. *Id.* at App. 119-25.

In view of the analytical process used by the court, re-

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12. Rather than ignoring the distinction between intervention as of right and permissive intervention, as the District Attorney suggests, *see* Petition for Certiorari at 27, the court explicitly clarified that it would conduct a more stringent review than the abuse of discretion review accorded denials of motions for permissive intervention. App. 112-13.

gardless of the label attached to that process, the conflict with decisions of other courts of appeals is more apparent than real.[13] From a practical standpoint, the court's review could not have been more plenary. Therefore, a remand would likely do nothing other than produce the same decision, albeit accompanied by a different label. Accordingly, this Court should reject the District Attorney's suggestion that this case presents the appropriate opportunity to resolve that conflict and should deny the District Attorney's petition. *Cf. Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari not warranted to resolve merely academic problem).

III. The Court of Appeals Properly Dismissed the District Attorney's Appeal of the Approval of the Consent Decree.

In addition to affirming the district court's denial of the District Attorney's Motion to Intervene, the Court of Appeals for the Third Circuit addressed the District Attorney's appeal of the district court's order approving the consent decree. The court did not, however, assess the merits of the consent decree. Rather, concluding that the District Attorney could not appeal the merits of the case, since he was properly denied intervention, the court dismissed the appeal. *Harris v. Pernsley* at App. 128. In so holding, the court emphasized that it did not decide "what legal and factual foundations are required" to uphold the entry of a consent decree, because the merits of the case had been challenged only by a non-party and thus were not properly before it. *Id.* at App. 129.

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13. A review of the opinions in which appellate courts have addressed denials of intervention reveals that the analytical process employed by those courts was essentially identical, whether a plenary or abuse of discretion standard of review was applied. *Compare, e.g., United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984) (abuse of discretion) *with, e.g., United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975) (plenary review), *cert. denied sub nom. National Org'n for Women, Inc. v. United States*, 425 U.S. 944 (1976). Thus, the thorough approach adopted by the court of appeals in this case, notwithstanding its adoption of an abuse of discretion standard, is not unusual. More important, a review of the practical applications of either standard of review merely underscores the futility of granting certiorari here to resolve the apparent conflict.

The dismissal of the District Attorney's appeal does not warrant review on certiorari. The weight of precedent in this Court and in the courts of appeals supports the Third Circuit's holding that a party denied intervention may not appeal the merits of the case. *See, e.g., Brotherhood of Railway Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 524 (1947) (applicant denied intervention may not appeal subsequent order or judgment in proceeding from which intervention denied); *S.C. Loveland Co. v. United States*, 534 F.2d 958, 960 & n.1 (D.C. Cir. 1976) (because applicant denied intervention was not party to proceedings below, court did not consider appeal of merits but only appeal from denial of intervention); *Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir.) (one properly denied status of intervenor may not appeal merits of case), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976); *Pellegrino v. Nesbit*, 203 F.2d 463, 468-69 (9th Cir. 1953) (applicant denied intervention may not perfect appeal on merits until intervention question decided on remand); *see also* 7C C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1923 (2d ed. 1986) at 518 & n.25.

In the face of this uncontested authority, the District Attorney does not, as he could not, directly challenge the reasoning of the Third Circuit in dismissing his appeal. Nonetheless, dissatisfied with that dismissal, he boldly requests that this Court avoid the real issue available for review and consider, instead, the merits of the consent decree, the precise issue the court of appeals explicitly did not address. *See Harris v. Pernsley* at App. 129. He does so by arguing that the district court lacked authority to approve the decree absent a full trial on the merits or specific judicial findings that Philadelphia's prisons violate the Constitution. *See* Petition for Certiorari at 20-26. To persuade this Court to grant certiorari, the District Attorney claims to have identified a split in the circuits on the issue of whether a court may approve a consent decree without either a trial or findings of unconstitutionality. In reality, however, no such split exists. A survey of caselaw addressing judicial authority and responsibility when approving consent decrees demonstrates the unanimity of opinion on that subject. Furthermore, a review of the consent

decree in this case reveals its consistency with that caselaw in general and with prior prison overcrowding decisions in particular. Despite the District Attorney's contentions, this consent decree contains nothing unusual or uncommon, and its approval by the district court presents no issue worthy of this Court's attention, even if that approval were properly reviewable at this time.

As early as 1928, this Court recognized the nature and importance of consent decrees in resolving civil disputes. *See Swift & Co. v. United States*, 276 U.S. 311 (1928). The value of such settlements remains unquestionable today, for

> [n]ot only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation. Thus, "[v]oluntary settlement of civil controversies is in high judicial favor."

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (quoting *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969)), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Fund*, 467 U.S. 1219 (1984).

Courts have pursued this strong, highly favored policy of encouraging settlement and voluntary remedial action in a wide variety of contexts, including prison overcrowding litigation. *See, e.g., Badgley v. Santacroce*, 800 F.2d 33, 38-39 (2d Cir. 1986) (affirming enforcement of prison admissions moratorium and noting strong judicial policy encouraging settlement of cases), *cert. denied*, 107 S. Ct. 955 (1987). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (Congress favors settlement in Title VII employment discrimination cases); *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 148 n.68 (D.D.C. 1982) (voluntary settlement encouraged in antitrust litigation), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

While pursuing this policy of settlement, however, courts are not meant to routinely approve parties' agreements. On the contrary, the judiciary maintains a vital role in evaluating several important aspects of proposed consent decrees. A court's first responsibility in this regard is to identify the

federal constitutional provision or federal statute that serves as the court's basis for ordering relief. *See, e.g., System Federation No. 91, Railway Employes' Department v. Wright*, 364 U.S. 642, 651 (1961) (court's authority to adopt consent decree comes only from that federal law the decree is meant to enforce); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983) (focus of court's inquiry when assessing consent decree is purpose of law intended to be enforced), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Fund*, 467 U.S. 1219 (1984).

Similarly fundamental to a court's responsibility is its determination of whether a proposed consent decree is fair, adequate, reasonable, and appropriate in each case, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980) (trial judge fulfills responsibility upon determination that proposed consent decree is fair, adequate, reasonable, and appropriate), and whether the settlement represents " 'overall fairness to beneficiaries and consistency with the public interest.' " *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977). At least one court has noted that this inquiry becomes especially important in cases that might affect third persons in some way. *Overton v. City of Austin*, 748 F.2d 941, 952-53 (5th Cir. 1984) (no abuse of discretion for district court to refuse to approve or reject proposed consent decree pending inquiry into fairness and reasonableness of decree). This inquiry is also important because, once approved, a consent decree has the same effect as a decree issued after a full trial on the merits. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

In evaluating whether consent decrees are fair and reasonable, courts need not withhold approval of proposed decrees until they conduct full trials on the merits or otherwise establish prerequisite findings of unconstitutionality. In fact, approved consent decrees often contain specific denials of fault or liability, and a court's authority to enter such a decree without forcing the parties to a full trial or to admissions of constitutional violations is long-established. *See Swift & Co. v. United States*, 276 U.S. 311 (1928). In *Swift*, the Court specifically rejected the idea that approval of a consent decree was

improper absent factual findings of federal law violations, and concluded that "allegations of the bill not specifically denied may have afforded ample basis for [the] decree." *Id* at 327.

Since *Swift*, numerous other judicial opinions have clarified the nature of the "ample basis" normally necessary to permit approval of a consent decree. Those opinions establish that a court need only identify a *prima facie* case supporting a complaint before establishing a basis for its authority to approve a proposed decree. *See Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1130 (2d Cir. 1983) (*prima facie* showing of discrimination constitutes sufficiently serious claim to serve as predicate for voluntary compromise), *cert. denied sub nom. Althiser v. New York State Department of Correctional Services*, 465 U.S. 1005 (1984). *See also Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 226-27 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); *City of San Francisco v. San Francisco Police Officers Association*, 621 F. Supp. 1221, 1223 (N.D. Cal. 1985). This authority to approve a consent decree remains valid even if the remedy adopted in the consent decree somehow conflicts with or disrupts state or local law. *Sarabia v. Toledo Police Patrolman's Association*, 601 F.2d 914, 918 (6th Cir. 1979) (local civil service rule that conflicts with provisions of approved consent decree must give way).

Of course, judicial discretion in the adoption of consent decrees is not unfettered. A court could not, for example, approve a consent decree that violates the federal law it is intended to enforce. *See Society Hill Civic Association v. Harris*, 632 F.2d 1045, 1057-58 (3d Cir. 1980) (permitting challenge to earlier consent decree because district court lacked authority to approve, in consent decree or otherwise, plans for housing in urban renewal project that violated federal statutory requirement of compliance with local zoning ordinances). Neither could a court enforce a consent decree that placed a direct financial obligation on a party not before the court. *Washington v. Penwell*, 700 F.2d 570, 573-74 (9th Cir. 1983) (consent decree unenforceable to extent it bound state legislature, not before court in litigation, to fund legal services perpetually).

With these general principles in mind, the appropri-

ateness and propriety of the consent decree in this matter become clear. In evaluating and adopting this decree, the district court faithfully applied these principles. Furthermore, it approved a consent decree consistent with those adopted in other inmate overcrowding cases.

Certainly, the district court had, at issue before it, identifiable federal law provisions. By alleging unconstitutional prison overcrowding, the plaintiffs invoked the protections guaranteed by the cruel and unusual punishment clause of the eighth amendment for sentenced inmates, *see Rhodes v. Chapman*, 452 U.S. 337 (1981), and the due process clause of the fourteenth amendment for pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

There can also be no credible dispute in this case as to whether the district court fulfilled its responsibility to evaluate the fairness of the decree. First, the court had before it a well-established *prima facie* case of overcrowding. Specifically, the district court had, for its consideration: the unanswered second amended complaint; the court's own observations of the prison facilities at issue, made during a personal tour of those facilities; various stipulations regarding conditions within the prisons, accepted during intervention proceedings; various statistical reports concerning cell numbers, cell sizes, inmate populations, and descriptions of daily inmate life within the prisons; information and argument regarding the wisdom of the consent decree offered by both proponents and opponents of the decree at hearings conducted to assist the court's evaluation, *see Harris v. Pernsley* at App. 50; *Harris v. Pernsley*, 654 F. Supp. 1042, 1045 (E.D. Pa. 1987); and all of the opinions and orders issued in a related state court proceeding in which the Philadelphia prisons remained under a declaration of unconstitutionality for almost fourteen years. *See Jackson v. Hendrick*, 509 Pa. 456, 503 A.2d 400 (1986). Thus, the court reviewed a record that established, at the very least, a *prima facie* case of overcrowding, and that record served as the "ample basis" for the court's authority to approve a consent decree.

In its opinion approving the decree, the district court fully documented its consideration of the fairness, adequacy, reasonableness, and appropriateness of the decree. *Harris v.*

Pernsley,' 654 F. Supp. 1042 (E.D. Pa. 1987) (*passim*). In addition, the district court exhaustively considered the effect the decree might have on third parties, particularly the District Attorney and the state criminal courts. In this regard, the court ruled correctly that the decree would, at most, have only an indirect impact on persons not parties to the litigation. *Harris v. Pernsley* at App. 48-68. For all these reasons, the district court properly evaluated and approved the consent decree in this matter. In doing so, the district court took no unusual action. Population caps and/or admissions moratoriums are among the most common remedies implemented in prison overcrowding litigation.[14]

Similarly, little doubt exists as to a court's authority to implement overcrowding remedies by consent decree; at least

14. *See, e.g., Duran v. Elrod*, 760 F.2d 756, 757 (7th Cir. 1985) (affirming lower court order capping Cook County jails, resulting in release of more than 10,000 inmates during 1984); *Badgley v. Varelas*, 729 F.2d 894, 903 (2d Cir. 1984) (directing implementation of admissions moratorium on county jail to reduce overcrowding); *Ruiz v. Estelle*, 679 F.2d 1115, 1148 (5th Cir.) (affirming portion of trial court decree requiring reduction in prison population by certain date and establishing admissions moratorium if mandated levels not achieved) *am'd in part, vacated in part, reh. denied in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Jones v. Diamond*, 636 F.2d 1364, 1383 (5th Cir.) (district court directed on remand to set maximum number of prisoners confined and to enjoin confinement of greater number), *am'd sub nom. Ledbetter v. Jones*, 453 U.S. 911, *cert. dismissed*, 453 U.S. 950 (1981); *Williams v. Edwards*, 547 F.2d 1206, 1215, 1219 (5th Cir. 1977) (affirming trial court order forbidding new admissions to inmate population); *Costello v. Wainwright*, 525 F.2d 1239, 1242, 1252 (5th Cir.) (affirming trial court order requiring reduction of population by specific date and criticizing defendants for not expanding early release policy), *vacated*, 539 F.2d 547 (5th Cir. 1976) *(en banc), rev'd and remanded*, 430 U.S. 325 (1977), *on remand*, 553 F.2d 506 (5th Cir. 1977) *(en banc)* (panel opinion reinstated); *Inmates of Allegheny County Jail v. Wecht*, 573 F. Supp. 454, 457-58 (W.D. Pa. 1983) (county jail population cap level maintained by formula of one release for every admission); *Benjamin v. Malcolm*, 564 F. Supp. 668, 691 (S.D.N.Y. 1983) (refusing to modify order capping population of New York City jail); *McMurry v. Phelps*, 533 F. Supp. 742, 775 (W.D. La. 1982) (establishing cap on inmate population); *Gross v. Tazewell County Jail*, 533 F. Supp. 413, 436 (W.D. Va. 1982) (establishing cap on number of inmates and procedure for release whenever population exceeds cap); *Vqzquez v. Gray*, 523 F. Supp. 1359, 1366 (S.D.N.Y. 1981) (acknowledging court authority to release prisoners if necessary to reduce overcrowding).

two other courts have previously done just that. In *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984), for example, the court considered various mechanisms to reduce inmate populations and selected an admissions moratorium. *Id.* at 903. Significantly, it did so following its conclusions that no violation of any constitutional provision had been proved and that no such proof was necessary to either adopt or enforce the consent decree at issue. *Id.* at 899-900 (relying on *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).[15]

Similarly, in *Duran v. Elrod*, 713 F.2d 292 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984), the parties entered a consent decree in a prison overcrowding lawsuit. Although the original decree in that case contained no maximum population levels or enforcement mechanisms, the parties agreed to cap levels in the course of enforcement proceedings. On appeal, the court specifically rejected a contention that the parties and, consequently, the district court had no authority to order releases in order to enforce the decree. *Id.* at 293-94, 298. Again, that court identified no findings of unconstitutional conditions before it directed the release of more than 10,000 inmates. *See Duran v. Elrod*, 760 F.2d 756, 757 (7th Cir. 1985).

Here, the District Attorney cites no caselaw from the context of prison conditions litigation to contradict the rulings of the *Badgley* and *Duran* courts. His attempts to find oppos-

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15. The only difference between the instant case and *Badgley* is that the consent decree here contains an enforcement mechanism (admissions moratorium), while the original *Badgley* decree contained only maximum population levels; enforcement in *Badgley* came after a period of violation of the population levels. This single difference highlights the insignificance of the issue raised here by the District Attorney regarding the propriety of including a moratorium in the consent decree itself. As discussed earlier, the Philadelphia Home Rule Charter gives the City administration full authority to determine maximum population levels within the City prisons. Not even the District Attorney contests the City's right, pursuant to that authority, to set those population levels and include them in a consent decree. *Badgley* teaches that a court may enforce its consent decree, once approved, even through a moratorium mechanism not previously agreed to by any party. It is pure folly to suggest that the district court may not, in a consent decree, describe in advance how it will exercise its enforcement authority.

ing authority in other contexts flounders upon examination of the cases he cites. To support his contention that some courts have held that findings of unconstitutionality are necessary to confer authority to approve consent decrees, the District Attorney cites three cases and makes reference to several dissenting opinions by members of this Court. Ultimately, none supports his position.

For example, the District Attorney cites *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), for the proposition that "absent a federal law violation, a consent decree entered in a federal court cannot preempt state law." Petition for Certiorari at 23 n.20. In fact, *Penwell* cannot support this proposition because the court never addressed the need for a finding of unconstitutionality before it could accept a consent decree. Rather, this case involved the question of whether a court could enforce a consent decree provision perpetually binding the state of Washington to fund inmate legal services when the state was not a party to the action and had not consented to being sued. *Id.* at 574. Predictably, the court concluded that the provision was unenforceable in light of eleventh amendment considerations, and because the decree imposed a direct financial burden on a non-party to the litigation. *Id.*[16]

Similarly, *Society Hill Civic Association v. Harris*, 632 F.2d 1045 (3d Cir. 1980), provides no support for the District Attorney's position. In that case, the court reversed the district court's dismissal of the action and ruled that the plaintiffs were not collaterally estopped from challenging an earlier consent decree. The court based its decision on the fact that the plaintiffs were not parties to the earlier litigation and on

16. The District Attorney's reliance on *Penwell* is also difficult to understand because the only discussion in that case of a court's authority regarding state law actually contradicts his position. In considering whether the constitutional guarantee of access to courts required the provision of legal services, the court concluded that no such requirement existed. 700 F.2d at 574. If it had, the *Penwell* court acknowledged, the federal court would have had authority to adopt and enforce a consent decree that called for the provision of those legal services despite any protests or objections by the state. *Id.* Since consent decrees typically contain denials of liability or unconstitutionality, the *Penwell* court thus confirmed by implication its authority to act, consistent with constitutional guarantees, in opposition to state law, even absent findings of unconstitutionality.

the fact that they had not unreasonably delayed their challenge in court. The court explained that the plaintiffs might have presented a legitimate challenge to the consent decree when they alleged that the decree violated the federal law it was intended to enforce. *Id.* at 1057-58. If so, the court reasoned, the district court had no authority to order the challenged relief at any time, either before or after a trial on the merits. *Id.* Again, the court never addressed the district court's pretrial versus post-trial authority to order relief and never even touched on the issue of conflicts between consent decrees and state law. The court discussed only the requirements and prohibitions of the federal statute at issue and whether a consent decree could violate that federal statute.[17]

Next, the District Attorney cites a passage from *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984), as support. *See* Petition for Certiorari at 22-23. In *Overton*, the plaintiffs challenged the constitutionality of the city's election system. When the district court failed to approve, reject, or otherwise act on a consent decree within ten days of its proposal, the parties appealed from what they characterized as a *de facto* denial of the decree. They also sought a writ of mandamus ordering the district court to approve the proposed decree. *Id.* at 946. The appellate court first rejected the appeal as interlocutory. *Id.* at 952. The court next rejected the mandamus request, holding that the district court did not abuse its discretion when it delayed action on a consent decree until it conducted a factual hearing to evaluate the validity of objections made to the proposed decree. *Id.* at 957-58. The passage quoted by the District Attorney occurs in the context of the

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17. Similar discussions occurred in other writings referred to by the District Attorney. For example, in his dissent from a denial of certiorari in *Bushey v. New York State Civil Serv. Comm'n*, 469 U.S. 1117 (1985), Justice, now Chief Justice, Rehnquist stated that he would grant certiorari to consider the issue of whether the 14th amendment and Title VII ever authorize voluntary affirmative action by a state employer. That is, the lower court might have lacked authority to approve the consent decree at issue because the remedy called for might violate the federal law meant to be enforced. Again, this citation provides no support whatsoever for the proposition that a court may not, absent findings of unconstitutionality, approve a consent decree that suspends state law.

court's recitation of some of the objections raised by would-be intervenors and serves only as a basis for the court's holding that the district court did not abuse its discretion in delaying approval of the decree until the objections could be considered fully. The court of appeals never discussed the district court's authority to approve the proposed decree. Significantly, the District Attorney cites to no such discussion within the case.

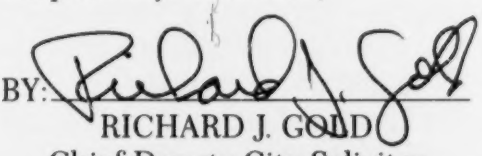
Finally, the District Attorney seems to rely on a quote from *Leslz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987). *See* Petition for Certiorari at 24 n.22. In that case, the court rejected those parts of a consent decree that violated state law but that had been included in the settlement only to resolve pendent state-law claims. *Id.* at 1251. The rejected portion of the settlement had no basis in or relation to any federal claim. *Id.* The court concluded that a federal court was not free to reach out and manipulate state law when doing so is completely unrelated to any federal right or claim. The case does not support the proposition that a federal court must find proven violations before it can approve a decree intended to enforce a federal right.

When accurately reviewed, the District Attorney's position on this issue lacks any caselaw support whatsoever. Certainly, no split exists among the circuits. If anything, the rule proposed by the District Attorney here flatly violates the unanimous and well-established policy of encouraging settlements in civil actions. In fact, by eliminating the authority of courts to approve consent decrees without proof of constitutional violations, his rule would not only discourage settlements, it might actually require full trials in every case. For all the reasons set forth above, this position is unsupported and in direct opposition to established jurisprudence.

CONCLUSION

For all the reasons stated above, the City respondents respectfully request this Court to deny the District Attorney's Petition for Writ of Certiorari.

Respectfully submitted,

BY: 

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK, CHARLES OAKES, EMANUEL GARDNER	:	CIVIL ACTION
v.	:	
IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director	:	

of the City of Philadelphia, :
WILLIAM J. GREEN, individually, :
HON. WILSON GOODE, individually :
and in his official capacity as Mayor of :
the City of Philadelphia, :
CITY OF PHILADELPHIA :
JAY C. WALDMAN, individually and in :
his official capacity as General Counsel :
for the Commonwealth of Pennsylvania, :
RONALD J. MARKS, individually, :
GLEN JEFFES, individually and in his :
official capacity as Commissioner of the :
Pennsylvania Department of Corrections. :

ORDER

AND NOW, this 13th day of July, 1987, upon consideration of the joint motion of the plaintiff class and the city defendants to amend the final order, it is ORDERED that:

1. The joint motion is GRANTED.

2. Paragraphs 2f and 2g of this court's Order of December 30, 1986 are AMENDED to read as follows:

2f. The population of the Philadelphia Prisons shall not exceed the following levels:

As of July 20, 1987	—3,950 inmates
As of September 14, 1987	—3,850 inmates
As of October 19, 1987	—3,750 inmates

Thereafter, the prison population shall not exceed 3,750 until the opening of the downtown detention facility. All population levels established by this subsection shall be referred to hereafter as "the maximum allowable populations."

2g. On and after October 19, 1987, the population of the respective individual facilities within the Philadelphia Prison System shall not exceed the following levels:

Detention Center	750 inmates
Holmesburg	800 inmates
House of Correction	900 inmates
Women's Modular Units	200 inmates

Laural Hall, Cannery and YMCA	250 inmates
Philadelphia Industrial Correction Center	850 inmates
TOTAL	3,750 inmates

3. In all other respects, this court's Order of December 30, 1987 shall remain unchanged.

/s/ NORMA L. SHAPIRO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, et al.	:	CIVIL ACTION
v.	:	
IRENE PERNSLEY, et al.	:	NO. 82-1847

ORDER

AND NOW, this 25th day of September upon consideration of:

1) Municipal Defendants' Motion to Enlarge Time;

2) Stipulation dated September 25, 1987;

3) The procedural history of repeated petitions for stay, the most recent of which is pending;

It appearing to the court that the uncertainty as to whether or not a stay would be granted by appellate court has made it difficult to proceed with compliance and, the parties having agreed to submit a plan to insure future compliance, a reasonable extension of compliance dates being in the interest of justice, it is ORDERED that:

1) Municipal Defendants' Motion to Enlarge Time is denied as moot.

2) The parties shall comply with the stipulation attached hereto and made a part hereof.

3) The proposed plan required by Pa. 3 of said stipulation, shall also address computerization needs and plans of the Philadelphia court system.

In addition, the parties shall brief the following no later than October 26, 1987:

A) Under Pennsylvania law, where inmates serving sentences of between 2 and 5 years may be held, by whom the place of incarceration is determined and whether this determination is mandatory, discretionary, final or appealable;

B) Pennsylvania and federal law regarding timeliness of sentencing;

C) Pennsylvania and federal law regarding incarceration of probation and parole violators and timeliness of disposition of said charges.

4) A hearing will be held on Thursday, November 5, 1987 at 9:00 a.m. in Courtroom 10-A.

The parties shall be prepared to make part of the record the number as of the end of October of:

A. Inmates serving sentences of between two and five years in the Philadelphia prisons who are eligible for incarceration in state correctional facilities.

B. Inmates held on alleged violations of state probation or parole who could be incarcerated in state correctional facilities awaiting review of their charges.

C. Convicted inmates awaiting sentencing and the length of time since conviction.

D. Persons held for trial in Philadelphia's Municipal Court and the length of time they have been held.

5) David S. Owens, named a party in his individual as well as official capacity as Superintendent of Philadelphia Prison System, now commissioner of prisons of the Commonwealth of Pennsylvania is requested to attend together with his successor in office in Philadelphia.

/s/ NORMA L. SHAPIRO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, et al.	:	CIVIL ACTION
v.	:	
IRENE F. PERNSLEY, et al.	:	NO. 82-1847

STIPULATION

WHEREAS, despite the exercise of good faith efforts, City-Defendants have failed to maintain the maximum allowable population within the limits prescribed by the Court's December 30, 1986 Order, as amended by Order dated July 13, 1987;

WHEREAS, the experience under the Order of December 30, 1986, reinforces the conviction of the parties that, short of enforcing the moratorium on new admissions contemplated under Paragraph 5 of the Order, attainment and maintenance of the maximum allowable population require a reduction in the length of time currently required for the trial and disposition of criminal cases in the Philadelphia Court of Common Pleas and Municipal Court;

WHEREAS, the parties and the Court remain committed to achieving an orderly and permanent reduction of the population of the Philadelphia County Prisons to the previously agreed-upon levels;

WHEREAS, City-Defendants understand that the Court will not tolerate further delay in the achievement and maintenance of the maximum allowable population and will enforce the provisions of Paragraph 5 of the Order of December 30, 1986, establishing a qualified moratorium on new prison admissions if the terms of this Stipulation are not satisfied;

NOW THEREFORE, the Parties, with the approval of the Court, hereby agree as follows:

1. Temporary Stay

The provisions of Paragraph 5 of the Order of December 30, 1986, are temporarily stayed in accordance with the further terms of this Stipulation, notwithstanding City-Defendants' failure to maintain the aggregate population of the Philadelphia County Prisons within the applicable maximum allowable population. The provisions of Paragraph 5 shall apply in the event City-Defendants fail to achieve the following milestones or to perform any of the undertakings hereafter specified.

2. Milestones

The maximum allowable population of the Philadelphia County Prisons shall be 3,750 as of November 23, 1987. By October 1, 1987, the parties shall submit to the Court a schedule of intermediate milestones.

3. Plan for Permanent Amelioration of Overcrowding

No later than October 26, 1987, City-Defendants shall submit to the Court a plan, approved and endorsed by the appropriate officials of the Court of Common Pleas of Philadelphia County and the Municipal Court of Philadelphia County. Such plan shall specify the measures being implemented and which will be implemented to achieve and maintain the maximum allowable population on a continuing basis over time. Such plan shall, among other things, address such changes in the administration of criminal cases as the Courts intend to adopt to reduce delays in the conduct of hearings, trials, and sentencings for persons held in detention. The plan shall also contain a schedule for its implementation.

4. Reapplication of Admissions Moratorium

If the milestones stated in paragraph 2 hereof are not achieved or the plan contemplated by paragraph 3 hereof is not submitted timely, the provisions of Paragraph 5 of the Order of December 30, 1986 shall apply with full force. Submission of the plan shall not excuse a failure to achieve the

then-applicable milestone. Failure to submit a timely, acceptable plan shall trigger the provisions of Paragraph 5 unless City-Defendants have, by October 26, 1987, achieved compliance with the final maximum allowable population for each facility.

5. Revisions of Order

By October 9, 1987, the parties shall have negotiated and submitted to the Court proposed modifications to the Order of December 30, 1986, for the purpose of better effectuating the intent of the Order to maintain the maximum allowable population on a continuing, not sporadic, basis.

/s/ DAVID RICHMAN

DAVID RICHMAN
Counsel for Plaintiffs

/s/ RICHARD J. GOLD

RICHARD J. GOLD
Counsel for City Defendants

Dated: September 25, 1987

APPROVED:

/s/ NORMA L. SHAPIRO

J.